

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

[PROPOSED] ORDER APPROVING SETTLEMENT AGREEMENT
BETWEEN CENTRAL VALLEY REGIONAL WATER
QUALITY CONTROL BOARD AND
HILMAR CHEESE COMPANY, INC., AND HILMAR WHEY PROTEIN, INC.

(ORDER NO. R5-2005-XXXX)

Pursuant to California Water Code (CWC) Section 13323, 13350 and California Government Code Section 11415.60, the California Regional Water Quality Control Board, Central Valley Region (Regional Board) finds:

1. This Order Approving Settlement Agreement (Order) constitutes the Board's formal action approving administrative settlement of Administrative Civil Liability Complaint No. R5-2005-0501 (ACL Complaint). The Order is based upon the Regional Board's evaluation of the record in this matter, including without limitation, the following:
 - The allegations of the Regional Board's prosecution staff contained in the ACL Complaint and the associated ACL Complaint Staff Report;
 - The responsive allegations, including the denial of liability, contained in the Prepared Direct Testimony and Expert Reports, and related exhibits, submitted by Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc (collectively "Hilmar");
 - The Regional Board's public records and files;
 - The Settlement Agreement prepared by Regional Board prosecution staff and Hilmar (collectively the "Parties");
 - The Additional Information Related to Settlement of ACL Complaint No. R5-2005-0501 Against Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc.;
 - Any written public comments and responses from the Parties, and any further information received in open session during the agenda item on this matter, including public comments, and comments from the Parties.
2. On 26 January 2005, the Executive Officer issued the ACL Complaint to Hilmar Cheese Company, Inc., Hilmar Whey, Inc., Hilmar Cheese Company Properties Partnership (HCCPP), and Kathy and Delton Nyman, dba Delton Nyman Farms (collectively "Dischargers"). The ACL Complaint alleged that the Dischargers violated Waste Discharge Requirements Order No. 97-206 (the Permit) by exceeding the Permit's EC discharge specification in violation of CWC Section 13350(a).
3. By letter dated 31 January 2005, the Dischargers requested an extension of the 26 February 2005 deadline in the ACL Complaint for payment of the proposed civil liability of \$4 million and

waived the Dischargers' right to a hearing within 90 days of service of the Complaint, but not the Dischargers' right to a hearing.

4. On 7 April 2005, the ACL Complaint was withdrawn as to HCCPP and Kathy and Delton Nyman, dba Delton Nyman Farms, but Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc. remained named defendants on the ACL Complaint.
5. On 8 April 2005, the Regional Board prosecution staff issued and made public an ACL Complaint Staff Report that discussed the factors that this Board would consider under CWC Section 13327 in issuing an order to Hilmar for administrative civil liability pursuant to CWC Section 13350.
6. On 9 September 2005, Hilmar submitted testimony and expert reports in support of its position that the imposition of liability, and the amount of the proposed liability, are improper. This information was placed in the public file in the Fresno Regional Board office on 9 September 2005.
7. Also on 9 September 2005, the Parties reached a conceptual settlement agreement and thereupon requested that the Regional Board's presiding officer suspend the procedural and discovery schedules to allow the Parties to focus all of their resources on negotiating the details of the conceptual settlement agreement, which request was granted.
8. During September 2005, additional information became available to the Regional Board concerning matters investigated by the Office of the Attorney General for which it was determined that the Attorney General would not pursue criminal charges against Hilmar.
9. A summary of this additional information has been made available to the public and the Regional Board in the document prepared by Regional Board prosecution staff titled Additional Information Related to Settlement of ACL Complaint No. R5-2005-0501 Against Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc.
10. The Regional Board is informed that the Regional Board's Executive Officer and Hilmar have reached an agreement to resolve the ACL Complaint and the additional allegations considered by the Office of the Attorney General as part of the Matters Covered in the Settlement Agreement, a copy of which is attached to this Order.
11. The Regional Board understands that the Parties crafted and executed the attached Settlement Agreement in good faith and to avoid the uncertainty and expense of protracted litigation, and that the Parties believe the Settlement Agreement to be appropriate, proper and in the public interest.
12. Key terms of the Settlement Agreement include:
 - (1) A commitment by Hilmar to make payments totaling \$3 million, \$1.85 million of which is to be paid to the State Water Resources Control Board, Waste Discharge Permit Fund; \$1 million of which will be paid to an escrow account to fund a supplemental environmental project (SEP) that will study the management of salinity in wastewater in the California food processing industry; and \$150,000 of which will

be paid to the Office of the Attorney General to reimburse its staff costs and attorneys' fees in assisting Regional Board staff in prosecuting the ACL Complaint;

- (2) A Regional Board agreement to release Hilmar from the imposition of further civil liability for the Matters Covered for specified duration, conditioned upon Hilmar's performance of and compliance with the terms of the Settlement Agreement; and
 - (3) A release that does not apply to or impact the Regional Board's ability to enforce Cleanup and Abatement Order No. R5-2004-0722, or to use other enforcement tools, including without limitation administrative enforcement (besides civil liability) or civil injunctive relief, if necessary to address conditions of pollution or nuisance that may be created by Hilmar's wastewater discharge.
 - (4) Agreement by Hilmar that this Order Approving Settlement Agreement and the Settlement Agreement incorporated herein may be enforced in the manner provided for in CWC Section 13328.
13. The Settlement Agreement describes the SEP and specifies requirements for funding, implementation, reporting and completion of the SEP.
 14. The Parties propose for the Board's consideration this Order Adopting Settlement Agreement that requires Hilmar to meet the obligations set forth in the Settlement Agreement.
 15. The Regional Board recognizes that the proceeding commenced by issuance of the ACL Complaint is not complete and the Regional Board has not held a public hearing in this matter and has not received or considered evidence concerning this matter.
 16. The Regional Board, however, has considered the allegations of the Parties as reflected in the above-described materials and has further considered any additional information and comments received from the Parties and the public concerning this matter.
 17. The public and the Regional Board have had an opportunity to review the record in this matter and have sufficient information to evaluate whether the Settlement Agreement is appropriate, proper and in the public interest.
 18. The Regional Board has considered the Settlement Agreement, the Executive Officer's support of the settlement, the above-described information, including public comment, and based on the foregoing, finds the Settlement Agreement to be appropriate, proper and in the public interest.
 19. This action to adopt an Order Approving Settlement Agreement which resolves the ACL Complaint is exempt from the provisions of the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.), in accordance with Title 14, California Code of Regulations (CCR), Enforcement Actions by Regulatory Agencies, Section 15321(a)(2) and in accordance with Title 14, CCR Existing Facilities, Section 15301, because there is no expansion of an existing discharge.
 20. Any person affected by this action of the Regional Board may petition the State Water Resources Control Board (State Board) to review the action in accordance with sections 2050 through 2068,

Title 23, California Code of Regulations. The petition must be received by the State Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions are available at http://www.swrcb.ca.gov/water_laws/cawtrcde/wqpetition_instr.html and will also be provided upon request.

IT IS HEREBY ORDERED THAT:

1. The Regional Board determines that the attached Settlement Agreement is appropriate, proper and in the public interest and incorporates it fully herein.
2. The Regional Board ratifies and approves the Settlement Agreement entered into by the Executive Officer as if it had been entered into on behalf of the Regional Board, and covenants and agrees to be bound by the terms of the Settlement Agreement.

I, THOMAS R. PINKOS, Executive Officer, do hereby certify the forgoing is a full, true, and correct copy of an Order of the California Regional Water Quality Control Board, Central Valley Region, adopted on _____ 2005.

THOMAS R. PINKOS
Executive Officer

(Date)